Supreme Court, U. S.
FILED
JUL 14 1976
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1975

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NO. 75-6797

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CHARLES MARTIN NEAL ..... *Appellant*

VS.

STATE OF ARKANSAS ..... *Respondent*

---

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARKANSAS

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## BRIEF IN OPPOSITION TO CERTIORARI

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### OPINION BELOW

The Opinion of the Supreme Court of Arkansas is reported at 259 Ark. 27, 531 S.W.2d 13 and reprinted in the appendix to the Petition for a Writ of Certiorari.

### JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTIONS PRESENTED

I

Whether the death sentence imposed on the petitioner pursuant to a statute enacted subsequent to this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972) is constitutional.

II

Whether the petitioner's jury was selected in a manner that comported with *Witherspoon v. Illinois*, 391 U.S. 510.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provision of the Constitution of the United States and statutes of the State of Arkansas are set forth in the petition at pp. 4-7.

## STATEMENT OF THE CASE

The petitioner, Charles Neal, was charged with capital felony murder in violation of Ark. Stat. Ann. §47-4701, et seq. by information filed on January 30, 1975.

The facts of the case show that the petitioner and another robbed a service station in Little Rock, Arkansas on December 1, 1974. In the course of the robbery the service station attendant had his hands and feet bound, shortly after this was done the petitioner for no reason shot him several times. The petitioner and the other man then left the service station, but shortly thereafter returned. Upon their return the petitioner again entered the station, there upon discovering that the attendant was on the phone attempting to get help, shot the attendant again.

A jury trial was held on May 20, 1975, which resulted in a verdict of guilty and a sentence of death by electrocution. The petitioner appealed his conviction and sentence to the Supreme Court of Arkansas. The conviction and sentence were affirmed on December 22, 1975. *Neal v. State*, 259 Ark. 27, 531 S.W.2d 13 (1975).

## ARGUMENT

The issues before this Court in this Petition are not unique nor novel. Petitioner in this case was convicted of a capital felony for his part in the commission of a murder during a robbery. The petitioner seeks review in this Court upon a claim that his death sentence violates the Eighth Amendment to the Constitution of the United States and the decision of this Court in *Furman*, supra. The respondent submits that the statute under which the petitioner was convicted and sentenced to die by electrocution is constitutional and does not offend the decision of this Court rendered in *Furman*, supra.

The petitioner also seeks to have this Court review the question of whether the jury that tried him was selected in a manner which comports with the holding of this Court in *Witherspoon*, supra. The trial judge excused for cause certain prospective jurors when they affirmatively indicated that they could not vote for the death penalty under any circumstances. The respondent respectfully submits that the decision of the Arkansas Supreme Court was proper and that the decision rendered by that Court was in conformity with the holding of *Witherspoon*, supra.

The petitioner also seeks to raise two other issues in his petition which were not presented to the Arkansas Supreme Court. The respondent respectfully contends that this Court does not have jurisdiction to review these questions since they have not been passed upon by the Supreme Court of Arkansas.

I

ARK. STAT. ANN. §41-4701 ET SEQ. (SUPP. 1973) DOES NOT OFFEND THE FOURTEENTH AND EIGHTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The decision in *Furman v. Georgia,* 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) did not rule the death penalty per se unconstitutional. The exact holding of the 5 to 4 decision in *Furman,* supra, was:

> "The Court holds that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishement in violation of the Eighth and Fourteenth Amendments." U.S. at 239-240, L. Ed. 2d at 350.

The five justices who joined in the Per Curiam Order each wrote separate opinions and none of them concurred in opinion of the other. The four dissenting justices filed separate opinions but did join in each other's opinions.

Of the five justices in the majority only Justices Brennan and Marshall found that the death penalty *was per se* unconstitutional.

The other three justices in the majority seem to base their decision finding the death penalty unconstitutional in the cases before them on the ground that there was no legislative guidance as to when the death penalty should be imposed. Justice Douglas noted:

> "We deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these

> laws *no standards govern* the selection of the penalty. People live or die, dependent on the whim of one man or of 12." *Furman*, supra. U.S. at 253, L. Ed. 2d at 357.

Justice Douglas went on to state: "Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." *Furman*, supra. U.S. at 256-257, L. Ed. 2d at 359.

Mr. Justice Stewart in *Furman*, supra, stated: "I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." U.S. at 310 L. Ed. 2d at 390. Justice Stewart indicated that the death penalty could serve the legitimate penal purpose of retribution. Mr. Justice Stewart stated:

> ". . . I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. . . When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve', then there are sown the seeds of anarchy — of selfhelp, vigilante justice, and lynch law." *Furman*, supra. U.S. at 308 L. Ed. 2d at 389.

The respondent submits that Ark. Stat. Ann. §41-4701, et seq. would pass constitutional muster by Mr. Justice Stewart since the law narrows the crimes for which the death penalty is possible and sets definite standards to be used in determining when to impose death thereby lessening the opportunity that it will be "wantonly and so freak-

ishly imposed." The respondent also points out that Mr. Justice Stewart was a member of the majority in *McGautha v. California*, 402 U.S. 183, 28 L. Ed. 2d 711 (1971) and did not expressly reject its holding in his opinion in *Furman*, supra.

The other Justice joining in the majority in *Furman*, supra, was Mr. Justice White. The respondent submits that Ark. Stat. Ann. §41-4701, et seq. (Supp. 1973) does not contain the same defect which caused Mr. Justice White to find the statutes in *Furman*, supra, unconstitutional. The respondent submits that a reasonable reading of Mr. Justice White's opinion reveals that its gravamen was that under the statutes before this Court in *Furman*, supra. The juries were given unfettered discretion in imposing the death penalty. In support of this theory the respondent respectfully directs the Court's attention to two passages in Mr. Justice White's opinion in *Furman*, supra:

> First: "The narrow question to which I address myself concerns the constitutionality of capital punishment statutes under which (1) the legislature authorizes the imposition of the death penalty for murder or rape; (2) the legislature does not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed), but delegates to judges or juries the decisions as to those cases, if any, in which the penalty will be utilized; and (3) judges and juries have ordered the death penalty with such infrequency that the odds are now very much against imposition and execution of the death penalty with respect to any convicted murder or rapist." U.S. at 311, L. Ed. 2d 390-391.

Second: "I add only that past and present legislative judgment with respect to the death penalty looses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime. Legislative 'policy' is thus necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them." U.S. at 314, L. Ed. 2d 392.

In addition to the above statements, the respondent in support of its contention that Justice White does not oppose all forms of jury sentencing in death penalty cases respectfully points out that he was a member of the majority in *McGautha*, supra.

The highest courts in several other states have been called upon to pass on the constitutionality of capital punishment statutes enacted after *Furman*, supra.

In *Jurek v. State*, 522 S.W.2d 934, 940 Ct. Cr. App. (Tex. April 16, 1975), the Texas Court in upholding a statute similar to Ark. Stat. Ann. §41-4701, et seq. (Supp. 1973) stated:

"Some discretion is inherent and desirable in any system of justice, from arrest to final judgment . . . The mere presence of discretion in the sentencing process does not render that procedure violative of *Furman*. It is rather the quality of discretion and the manner in which it is applied that must be controlled. To eliminate all discretion on the part of the jury would be to risk elimination of that valuable element which permits

individualization based on consideration of all extenuating circumstances and would eliminate the element of mercy, one of the fundamental traditions of our system of criminal jurisprudence. If discretion in the assessment of punishment under a statute can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of *Furman* will be met. (Footnote omitted)

The Supreme Court of Georgia in *Coley v. State*, 204 S.E.2d 612, 231 Ga. 829 (1974), upheld the constitutionality of a capital punishment statute that permitted limited discretion. In *Coley*, supra, the Court noted:

"The states are free, we must conclude, to provide a new system short of mandatory application [of the death penalty] . . . .

. . . The essential question is not whether our new death statute permits the use of some discretion, because admittedly it does, but, rather, whether the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application. . . . Logically, it is not discretion per se which must be condemned, but it is unguided discretion that does not 'produce evenhanded justice'." S.E.2d at 615-616.

A statute almost identical of Ark. Stat. Ann. §41-4701, et seq. (Supp. 1973) was held constitutional in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973). The Court pointed out that:

"The mere presence of discretion in the sentencing procedure cannot render the procedure violative of *Furman v. Georgia*, supra; it was, rather, the quality of discretion and the manner in which it applied that

dictated the rule of law which constitutes *Furman v. Georgia*, supra." *Dixon*, supra, at 6.

The State contends that the provisions of Ark. Stat. Ann. §41-4701 et seq. meets constitutional standards in that it eliminates the imposition of the death penalty on a "wantonly and freakishly" basis; and the jury is no longer left to "its own discretion" in determining what cases deserve capital punishment.

The saving features of Ark. Stat. Ann. §41-4701 et seq. (Supp. 1973) are contained in §§41-4710, 41-4711, and 41-4712. The important parts of §41-4710 are:

> (c) In the proceeding to determine sentence, evidence may be presented as to any matters relevant to sentence and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in Sections 11 [§41-4711] and 12 [§41-4712] of this act. The State and the defendant or his counsel shall be permitted to present argument for or against the sentence of death.
>
> (d) After hearing all the evidence as to sentence, the jury shall again retire and render a sentence based upon the following:
>
> (i) whether beyond a reasonable doubt sufficient aggravating circumstances, as enumerated in Section 11 [§41-4711] of this act, exist to justify a sentence of death;
>
> (ii) whether sufficient mitigating circumstances as enumerated in Section 12 [§41-4712] of this act exist to justify a sentence of life imprisonment without parole.

> (e) The jury in rendering its verdict shall set forth in writing its findings as to each of the aggravating or mitigating circumstances enumerated in Sections 11 [§41-4711] and 12 [§41-4712] hereof and shall set forth in writing its conclusion:
>
> (i) that sufficient aggravating circumstances (do or do not) exist beyond a reasonable doubt to justify a sentence of death;
>
> (ii) that there are (or are not) sufficient mitigating circumstances to outweigh the aggravating circumstances.

A review of this section, when read together with §§41-4711 and 4712, shows that the jury is given a great deal of guidance in reaching the answer of which punishment to impose and under this section a jury could only "violate its trust and statutory policy" by improperly imposing or not imposing the death penalty in a particular case.

The jury is given a list of the aggravating circumstances that they should consider by §41-4711 and are instructed only to consider those circumstances in determining aggravation. (Tr. 323) The jury also can consider circumstances in mitigation brought to its attention by §41-4712.

The respondent contends that a jury in Arkansas by following the procedure of §41-4710 may constitutionally impose a sentence of death.

> "The selectivity of juries in imposing the punishment of death [should] properly [be] viewed as a refinement of, the statutory authorization for that penalty. Legislatures prescribe the categories of crimes for which the death penalty should be available, and, acting as 'the conscience of the community,' juries are

> entrusted to determine in individual cases that the ultimate punishment is warranted." Per Chief Justice Burger, dissenting, *Furman*, supra, U.S. at 388, L. Ed. 2d at 435.

Caution should be exercised before invalidating a new death penalty statute on the basis of *Furman*, supra, due to the ambiguous nature of the majority position in the five to four decision. Also, as noted by the Chief Justice in *Furman*, supra, "In the 181 years since the enactment of the Eighth Amendment, not a single decision of this Court has cast the slightest shadow of a doubt on the constitutionality of capital punishment." U.S. at 380, L. Ed. 2d at 431.

The fact that in this case the jury imposed a death sentence shows that they followed the intent of the legislature. This case involves a very brutal killing that justifies the death penalty.

The State of Arkansas respectfully urges that this Court deny the petition for a writ of certiorari.

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II

THE TRIAL COURT PROPERLY EXCUSED FOR CAUSE THOSE JURY PANEL VENIREMEN WHO WOULD NOT CONSIDER THE DEATH PENALTY.

The trial court excused several prospective jurors for cause when it was determined that they would not consider imposing the death penalty. The jurors were excused after affirmatively answering the following two questions:

> "I will ask you if for any reason, personal reason or otherwise, that some of you will be unable to consider

> the death penalty in this case? (Tr. 82) [emphasis added] Each of you, I will take it, are stating that regardless of the facts you would be unable to consider the death penalty in the case?" (Tr. 83) [emphasis added]

The Respondent respectfully submits that affirmative answers to these questions authorized the trial court to excuse for cause those jurors who affirmatively answered the questions. An affirmative answer to these questions did not evidence only a "general objection" to the death penalty regardless of the facts of the case. *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 1776 (1968) only forbids the exclusion from juries those veniremen who "voiced general objections to the death penalty on expressed conscientious or religious scruples against its infliction." (U.S. at 522-23, L. Ed. 2d at 784-85) This Court in footnote number 21 of *Witherspoon*, supra, clearly pointed out:

> ". . . that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, . . . (U.S. at 522, L. Ed. 2d at 785)

By implication this Court held that it would be proper to excuse for cause a venireman who "unambiguously [stated] he would automatically vote against the imposition of capital punishment no matter what the trial might reveal." *Witherspoon*, supra, ftn. 9, U.S. at 515, L. Ed. 2d at 781.

The question in this case definitely shows the veniremen excused for cause would have automatically voted against giving the appellant the death penalty.

Other courts have affirmed convictions when jurors were excused for affirmatively answering questions similar to the ones asked in this case. In *State v. Mathis*, 245 A. 2d 20, 26, 52 N.J. 238 (1968), the Court approved the excusing when the question asked was: "whether she had any religious, personal or conscientious scruples which would make you unable in any case to vote for a verdict carrying with it the death penalty." The dismissal of a prospective juror was upheld when she answered, "I think so"; in response to the question: "[I]f you were selected as a juror in a first degree murder case, regardless of what the evidence showed, regardless of how bad the conduct of the defendant might be, because of your beliefs, you'd be unable to join in a verdict that would require capital punishment?" *State v. Elliott*, 267 N.E.2d 806, 808; 25 Ohio St. 2d 249 (1971).

No error was committed in this case by the trial court in excusing for cause those prospective jurors who could not vote for the death penalty under any circumstances. Therefore this Court should not grant the petition for a writ of certiorari.

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III

THIS COURT DOES NOT HAVE JURISDICTION TO GRANT A PETITION FOR A WRIT OF CERTIORARI ON PETITIONER'S ISSUES THAT "THE INSTRUCTION ON MENTAL RESPONSIBILITY VIOLATED DUE PROCESS BY PLACING THE BURDEN OF PERSUASION ON THE DEFENDANT" AND "THE STATE OF ARKANSAS HAS FAILED TO SHOW WHAT COMPELLING STATE INTEREST WILL BE SERVED BY IMPOSING THE DEATH PENALTY IN THIS ROBBERY-MURDER CASE. THEY HAVE ALSO FAILED TO SHOW THAT SUCH PENALTY IS THE LEAST RESTRICTIVE MEANS OF FURTHERING THE STATE'S PERMISSIBLE OBJECTIVES."

The petitioner seeks to have this Court grant a petition of certiorari to review the propriety of a jury instruction given at his trial and to review whether the death penalty imposed in this case violates the Fourteenth Amendment to the Constitution of the United States in that it deprives the petitioner of a fundamental right. These two points are raised as issues III and IV.

The petitioner in his direct appeal to the Arkansas Supreme Court raised neither of these issues before that Court. The respondent respectfully submits that since the issues were not presented to the Supreme Court of Arkansas the petitioner is precluded from now raising them for the first time in the petition for a writ of certiorari. In *Cardinale v. Louisiana,* 394 U.S. 437, 438; 22 L. Ed. 2d 398, 400 (1969) this Court stated: "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of State Court decisions." This Court reaffirmed its position that issues

cannot be raised for the first time in the petition for certiorari in the case of the *United States v. Ortiz*, 422 U.S. 891, 898 (1975) in which it said, "We therefore, decline to consider this issue, which was raised for the first time in the petition for certiorari."

Respondent prays that this Court will decline to issue a writ of certiorari since petitioner did not present the two above mentioned issues to the Arkansas Supreme Court.

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## CONCLUSION

For the above reasons, a writ of certiorari should be denied.

Respectfully submitted,

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